

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT CLEVELAND MITCHELL III,

Defendant-Appellant.

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UNPUBLISHED

September 30, 2003

No. 240597

Calhoun Circuit Court

LC No. 01-002066-FC

Before: Sawyer, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to do great bodily harm less than the crime of murder,<sup>1</sup> kidnapping,<sup>2</sup> felonious assault,<sup>3</sup> felon in possession of a firearm,<sup>4</sup> and two counts of possession of a firearm during the commission of a felony.<sup>5</sup> He was sentenced as a fourth felony offender to eight to twenty years on the assault with intent to do great bodily harm conviction, to thirty-five to sixty years on the kidnapping conviction, to four to fifteen years on the felonious assault conviction, to four to ten years on the felon in possession conviction, and to the mandatory two-year terms on the felony-firearm convictions. He now appeals and we affirm.

Defendant was romantically involved with the victim, Deborah Gordon. At the time defendant began seeing Gordon, he was also seeing and continued to see another woman, Grace Cowens. Several months after her affair with defendant began, the victim decided to tell Cowens about her relationship with defendant. The victim sent two letters to Cowens in which she somewhat explicitly explained that she was sexually involved with defendant. Defendant's convictions arise from an incident a short time later in which he tied the victim up in her apartment in Battle Creek, keeping her restrained for several hours, during which he physically

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<sup>1</sup> MCL 750.84.

<sup>2</sup> MCL 750.349.

<sup>3</sup> MCL 750.82.

<sup>4</sup> MCL 750.224f(1).

<sup>5</sup> MCL 750.227b.

assaulted her and threatened her with her own gun. The incident began about 10:30 in the evening and the victim was not untied until approximately 6 a.m. the next morning. The victim was able to get a way a couple of hours after that, fleeing in her car to her son's house in Marshall.

Defendant first argues that he was denied the effective assistance of counsel, citing three alleged deficiencies in his trial counsel's performance. The standard of review for a claim of ineffective assistance was set forth by the Supreme Court in *People v Carbin*:<sup>6</sup>

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant's first claim of ineffective assistance is that counsel should have stipulated to defendant's status as a convicted felon for purposes of the felon in possession charge rather than allowing the prosecutor to prove that defendant had previously been convicted of false pretenses over \$100. We disagree. This Court has held that a defendant has a right to stipulate to his status as a convicted felon in order to prevent the jury from discovering the exact nature of the prior conviction.<sup>7</sup> However, whether to make such a stipulation is a matter of trial strategy. In the case at bar, the prior conviction used by the prosecutor was for a non-violent crime (fraud). Defendant was charged with several violent felonies. We cannot say that it would be an unsound trial strategy to specifically inform the jury that the prior felony was nonviolent rather than allow the jury to speculate as to what the prior conviction was for. That is, by telling the jury what defendant had been convicted of, it prevented the jury from perhaps speculating that it was for something much worse and thus more prejudicial to defendant.

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<sup>6</sup> 463 Mich 590, 599-600; 623 NW2d 884 (2001).

<sup>7</sup> *People v Swint*, 225 Mich App 353; 572 NW2d 666 (1997) (trial court erred by denying defendant's stipulation that he had been previously convicted of felonious assault).

Defendant next argues that counsel was ineffective by failing to object to testimony concerning third-party threats against the victim after the charges against defendant were filed. While it is true that threats by a defendant may reflect a consciousness of guilt,<sup>8</sup> it is not clear to us what the relevance is of threats by a third party. But by the same token, it is not clear to us what prejudice there is to defendant by introducing this evidence. That is, if the threats are reflective of defendant's guilt, then they were admissible and there is no basis for counsel to have objected; if the threats are not reflective of defendant's guilt, then defendant has failed in his burden to show prejudice from counsel's failure to object. In either case, there is no basis for reversing defendant's convictions.

Defendant's third claim of ineffective assistance is somewhat more substantial. Trial counsel failed to comply with discovery rules by providing the prosecutor with copies of written documents before trial. Specifically, counsel had the letters written by the victim and sent to Cowens. As a result, the trial court prevented defendant from introducing the letters as exhibits or from quoting from the letters during cross-examination of the victim to contradict the victim's testimony regarding what she said in the letters. Clearly, if counsel wanted to use the letters, he had to provide the prosecutor with a copy. But we are not convinced that defendant was prejudiced by the failure. Counsel was permitted to cross-examine the victim regarding what she said in the letters to Cowens and, thus, develop defendant's theory of the case that the victim was falsely accusing defendant out of revenge for not breaking off his relationship with Cowens. The actual use of the letters as an exhibit adds little to the development of defendant's case unless the victim's testimony regarding the content of the letters was, in fact, inconsistent with the content of the letters. Defendant, however, points to no portion of the victim's testimony that was inconsistent with the letters. Accordingly, defendant cannot show that he was prejudiced by counsel's failure.

Defendant's second argument is that the trial court erred by excluding evidence of the victim's mental disorder to show why the victim would testify falsely. We disagree. While the trial court did limit defendant's inquiry in this area, defendant has made no offer of proof that the victim did, in fact, suffer from any such mental disorder. At most, defendant points to the victim's testimony at the preliminary examination where she supposedly admitted to receiving SSI benefits for a mental disorder. But defendant is being selective about what portion of her testimony he considers in making his point. The following exchange took place at the preliminary examination between defense counsel and the victim:

Q. Okay. Are you receiving SSI for any mental disorder?

A. Yes, sir.

This prompted an objection, which led to the following exchange:

MR. WEINER [Defense Counsel]: I want to know what this is for. What's she receiving it for, the SSI?

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<sup>8</sup> *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996).

\* \* \*

THE COURT: All right. You can answer it.

THE WITNESS: I get SSI because I injured my back at Fedco on Superior Street in Albion in 1995. I sued them and that's why I get disability. I have a degenerative disk disease in my back and a pinched sciatic nerve.

Thus, while the victim did initially respond "yes" to whether she was receiving SSI benefits for a mental disorder, her more detailed answer clearly reflects that this is not the case. The more logical explanation is that she misheard or misunderstood the original question and her fully articulated answer reflects that she was not receiving SSI benefits for a mental disorder. Moreover, the victim testified that she had not been treated for a mental illness or suicidal tendencies. She did admit to having previously suffered from a panic attack, but that hardly establishes a mental illness that would lead to her falsely accusing defendant as a result.

The Supreme Court's decision in *People v Stanaway*,<sup>9</sup> is instructive in this regard. *Stanaway* considered a defendant's access to a witness' mental health treatment records. The Court reaffirmed that such records are generally privileged, but did allow the option of an in camera inspection of those records by the trial court where the defendant has demonstrated a good-faith belief, grounded in a demonstrable fact, that there is a reasonable probability that those records would contain information favorable to the defendant.<sup>10</sup> In the case at bar, defendant has not pointed to any demonstrable fact to support the basis for his inquiry.

Indeed, the lack of an offer of proof regarding any alleged mental disorder by the victim renders us unable to meaningfully review this issue. As a result, we cannot say that the trial court abused its discretion in excluding the inquiry.<sup>11</sup> In short, defendant was merely looking to engage in a fishing expedition, hoping to find something or at least smear the victim's credibility in the process without any factual basis for engaging in the inquiry. We are not persuaded that the trial court erred in precluding this line of questioning.

The final argument raised in defendant's main brief on appeal is that the trial court violated his due process rights by excluding defense exhibits as an excessive remedy for the discovery violation of not turning over the letters which defendant sought to use as an exhibit at trial. Defendant argues that the trial court should have granted a brief continuance to allow the prosecutor to review the letters and thereafter allow defendant's full use of the letters. MCR 6.201 provides in pertinent part as follows:

(A) Mandatory disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a; MSA 28.1023(194a), a party upon request must provide all other parties:

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<sup>9</sup> 446 Mich 643; 521 NW2d 557 (1994).

<sup>10</sup> *Id.* at 677.

<sup>11</sup> See *People v Hampton*, 237 Mich App 143, 154; 603 NW2d 270 (1999).

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(5) any document, photograph, or other paper that the party intends to introduce at trial; and

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(J) Violation. If a party fails to comply with this rule, the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy.

Defendant does make a strong argument that a lesser sanction, such as a continuance to allow the prosecutor to review the letters, would have been a more appropriate remedy. But in the final analysis, we are persuaded that any error by the trial court in handling this matter was harmless beyond a reasonable doubt. As discussed above under the claim of ineffective assistance of counsel, defendant was permitted to fully cross-examine the victim on what she wrote in these letters. Moreover, defendant points to nothing in the victim's testimony which was inconsistent with the letters. Thus, while defendant was prevented from using the letters as an exhibit, he was able to bring their content to the jury's attention through the victim's testimony and make his argument that the victim was vindictive towards defendant. Accordingly, even if the trial court erred in this respect, we are not persuaded that it is more probable than not that any such error was outcome determinative and, therefore, that the error requires reversal.<sup>12</sup>

Finally, defendant raises a number of issues in a supplemental pro per brief. We have carefully reviewed those issue and none merit reversal.

Affirmed.

/s/ David H. Sawyer  
/s/ Joel P. Hoekstra  
/s/ Christopher M. Murray

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<sup>12</sup> *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).